

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
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Auction of the Phase II )  
220 MHz Service Licenses )  
 )  
Amendment of Part 90 of the )  
Commission's Rules To Provide )  
for the Use of the 220-222 MHz )  
Band by the Private Land Mobile )  
Radio Service )  
 )  
Implementation of Sections 3(n) )  
and 332 of the Communications Act )  
 )  
Regulatory Treatment of Mobile )  
Services )  
 )  
Implementation of Section 309(j) )  
of the Communications Act -- )  
Competitive Bidding, 220-222 MHz )

PR Docket No. 89-552  
RM-8506

GN Docket No. 93-252

PP Docket No. 93-253

To the Commission:

MOTION FOR TEMPORARY STAY

Net Radio Group Communications, L.L.C. ("NRG"),<sup>1/</sup> by its attorneys, and pursuant to Section 1.43 of the Commission's rules, 47 C.F.R. 1.43 and Section 416(b) of the Communications Act, 47 USC §416(b), hereby petitions for a stay of the auction of the Phase II 220 MHz service licenses scheduled for September 15, 1998 ("Auction Date") and of the mandatory preauction filings by parties intending

<sup>1/</sup> NRG is an entrepreneurial telecommunications entity formed in 1997 to acquire and operate 220 MHz and other communication systems. NRG has executed purchase contracts for over 40 Phase I non-nationwide 220 MHz licenses since its formation and is actively pursuing additional 220 MHz channels. In furtherance of its business plan, NRG plans to participate in the upcoming 220 MHz auction.

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to participate in this auction.<sup>2/</sup> For the reasons set forth below NRG urges that the Auction Date be stayed at least until a date not less than ninety days following Commission clarification of the status of all Phase I 220 MHz renewal applications.<sup>3/</sup>

## **I. Introduction**

In March of 1997, the Commission restructured the licensing framework that governs the 220 MHz Service.<sup>4/</sup> Site-specific licensing, used in the Phase I 220 MHz Service, is to be replaced with a geographic-based system in the Phase II 220 MHz Service which is the subject of the upcoming auction. This geographic-based licensing methodology is similar to that used in other commercial mobile radio services ("CMRS"). The geographic areas for the licenses were created based upon Economic Areas ("EAs"), developed by the Bureau of Economic Analysis of the U.S. Department of Commerce. The Economic Area Groupings ("EAGs"), developed by the Commission, include groupings of EAs and encompass the sum total of all EAs. Three Nationwide licenses, each including the

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<sup>2/</sup> See, Public Notice, "Auction of the Phase II 220 MHz Service Licenses, DA 98-1010" (rel. May 29, 1998) ("Auction Notice").

<sup>3/</sup> In a separate action filed this date, NRG urged the Commission to clarify the status of numerous Phase I 220 MHz licensees and certain license renewal procedures applicable thereto.

<sup>4/</sup> Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Third Report and Order; Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943 (1997).

geographic territory of all of the EAGs, are also to be offered in the Phase II 220 MHz Service auction.

There are a number of incumbent Phase I 220 MHz licensees operating on frequencies that will be subject to the upcoming auction. Such incumbents must be protected from harmful interference by Phase II 220 MHz licensees in accordance with the Commission's Rules. See, 47 C.F.R. §90.763. These limitations may restrict the ability of such Phase II geographic area licensees to use certain portions of the electromagnetic spectrum or provide service to certain areas in their geographic license areas that are licensed to these Phase I licenses.

The need to obtain accurate information regarding incumbents is crucial to bidders having a core understanding of the utility and economic value of the spectrum upon which they seek to bid. When the Commission first licensed 220 MHz non-nationwide spectrum, it granted as many applications as could be granted on an exclusive licensing basis, consistent with the order of selection in its lottery.<sup>5/</sup> Thus, since the 220 MHz spectrum in most important markets was applied for and licensed, if all parties that were initially licensed were to have remained licensed, there would be precious little spectrum in the important markets available at the auction.

A number of parties initially licensed for 220 MHz are no longer licensed. Some never constructed. Others have elected not

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<sup>5/</sup> Acceptance of 220-222 MHz Private Land Mobile Applications, Order, 6 FCC Rcd 3333 (1991).

to have their license renewed. However, many additional licensees have maintained their licenses through construction and renewal. Unfortunately, for reasons set forth in greater detail below, it is not possible for prospective bidders to obtain accurate information with respect to the renewals of a great number of those incumbents' licenses. Reference to the Commission's database for 220 MHz licensees will reveal only that renewal applications are pending. There is no statement that the applications have been granted, and questions exist with respect to the ultimate disposition of a great number of renewal applications. It is this uncertainty that robs prospective bidders of reasonable certainty on this major incumbency issue which is necessary to develop and execute their bidding strategies, including raising capital and determining prices to bid.<sup>6/</sup>

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<sup>6/</sup> The above major uncertainty stands in stark contrast to numerous open issues of lesser importance to prospective bidders about which the Commission has formally urged prospective bidders to be aware. For example, the Commission warned potential bidders that there are certain unresolved matters including applications, waiver requests, petitions for reconsideration and applications for review which could have an impact on the availability of spectrum for EA and EAG licensees. The Commission provided a list of such matters that it was aware of as an attachment to the Auction Notice. These uncertainties, while regrettable, are the types of uncertainties that exist in virtually all auctions and which carry relatively minimal risks to bidders. They stand in stark contrast to the incumbency issue discussed above.

**II. Uncertainty Regarding the Commission's Disposition of 220 MHz Renewal Applications Makes Investigating and Evaluating Incumbent Licenses' Impact on EA or EAG Licenses and Their Values Impossible.**

The Commission is returning a great number of the 220 MHz renewal applications to the licensees with a notice that they must provide the renewal expectancy showing required by Section 90.743 of the rules.<sup>2/</sup> This is so despite the fact that when the FCC sent the FCC Form 574R renewal application package to all 220 MHz licensees, licensees were instructed only to check the accuracy of the information, sign and date the application by an authorized

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<sup>2/</sup> Section 90.743 provides that (a) All licensees seeking renewal of their authorizations at the end of their license term must file a renewal application in accordance with the provisions of §90.149. Licensees must demonstrate, in their application, that: (1) They have provided "substantial" service during their past license term. "Substantial" service is defined in this rule as service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal; and (2) They have substantially complied with applicable FCC rules, policies, and the Communications Act of 1934, as amended.

(b) In order to establish its right to a renewal expectancy, a renewal applicant must submit a showing explaining why it should receive a renewal expectancy. At a minimum, this showing must include:

(1) A description of its current service in terms of geographic coverage and population served;

(2) For an EA, Regional, or nationwide licensee, an explanation of its record of expansion, including a timetable of the construction of new stations to meet changes in demand for service;

(3) A description of its investments in its system;

(4) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and

(5) A list of any pending proceedings that relate to any matter described in this paragraph.

person, and return the package to the Commission.<sup>8/</sup> There was never any mention of submitting the renewal expectancy showing as required by Section 90.743. Most, if not all, 220 MHz licensees complied with the Commission's instructions but failed to submit the renewal expectancy showing.

The Commission's return of numerous applications presents several problems with respect to the upcoming auction. First, it deprives prospective bidders of the threshold level of knowledge regarding incumbency that is required for those parties to make informed bidding decisions. Simply put, without having sound information vis-a-vis the status of Phase I licensees, bidders literally would not know what they are buying at the auction.

The problem is compounded because the Commission is returning certain but not all renewal applications to licensees with an opportunity to submit the renewal expectancy. At this point, it is not clear whether the Commission is returning every renewal application or how the Commission will treat those that were submitted without a renewal expectancy but have not been returned. Many licensees that own multiple licenses have had only certain of their renewal applications returned with a request for the renewal expectancy supplement. There are certainly questions and concerns about how the Commission may treat those applications that were not returned. It is also not clear what standard the Commission is

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<sup>8/</sup> The form indicates that the estimated amount of time to comply with the Commission's requirements for the renewal is an average of ten minutes.

applying with respect to acceptable responses to its requests for showings under Section 90.743.

Without consistent policy and application, parties intending to bid in the upcoming auction, including NRG, cannot determine what licenses, will be or will likely be (i.e., have an "expectancy" to be) renewed. Without this determination bidders have no way of knowing which channels in an EA or EAG will be protected under incumbent Phase I licenses and thus factor this information into a reasonable bid for an EA or EAG which includes these incumbent channels. Accordingly, it becomes critically important for the Commission to quickly and publicly articulate its policy on the renewal expectancy showing and how it will treat all 220 MHz renewal applications. Such clarification must be provided as soon as possible so that potential bidders can analyze properly the Commission's database and make the necessary determinations on how to bid.

**III. Request for Temporary Stay Pending Commission  
Clarification of Treatment of 220 MHz Renewal Applications.**

Petitioner requests such clarification by August 24. The auction should not be held until at least 90 days after the Commission has clarified its policy with respect to the 220 MHz renewal applications. By that time, licensees will have had an opportunity to comply with the clarified policy and potential bidders will have had sufficient time to review FCC records regarding such compliance and then to formulate an appropriate bidding strategy.

The traditional test for a stay requires consideration of four elements. They are whether the proponent of the stay has (1) made a strong showing that it is likely to prevail on the merits of its appeal; (2) shown that it will suffer irreparable harm if a stay is not granted; (3) shown the absence of harm to other parties; and (4) shown that the public interest would not be harmed by a stay.<sup>9/</sup> These factors are not to be applied rigidly; rather, "[t]he test is a flexible one".<sup>10/</sup> As the Commission has recently recognized "a stay may be granted based on a high probability of success and some injury, or vice-versa".<sup>11/</sup>

All four factors support grant of stay. NRG is likely to prevail on the merits of its Petition. NRG will suffer irreparable harm if stay is not granted. Other interested parties will not be harmed in any material way by grant of a stay. Lastly, the public interest, as measured both by the introduction of meaningful competition and by achievement of the goals articulated by Congress upon its grant of auction authority to the Commission, will be furthered by grant of stay. The requested clarification and related stay should result in more serious bidding strategies and

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<sup>9/</sup> Washington Metropolitan Area v. Holiday Tours, 559 F.2d 841 (1977) citing, Virginia Petroleum Jobbers Assn v. FPC, 259 F.2d 921 (1958).

<sup>10/</sup> Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986).

<sup>11/</sup> PCIA Stay Order, at n. 22, citing Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985).



commitments leading to a higher obligation by winning bidders to develop their licensees for public services.

**A. NRG is Likely to Prevail  
on the Merits of a Stay.**

There is substantial likelihood that NRG will succeed in showing that the Commission has applied unclear and inconsistent treatment to the 220 MHz renewal applications and, in any event, that it must make known to prospective bidders what licensees have (or will be able to submit) an expectancy of renewal showing. As demonstrated by NRG's Petition for Declaratory Ruling, filed concurrently herewith and incorporated herein by reference, the Commission has an obligation to treat similar applications being considered at the same time in a consistent manner. In furtherance of this obligation, and in order to provide prospective bidders with sufficient information to make informal decisions, the Commission must clearly and quickly articulate how it will apply the renewal expectancy requirements to all 220 MHz renewal applications.

**B. In the Absence of a Stay, NRG and Other  
Potential Bidders Will Suffer Irreparable Harm.**

The next factor, to be addressed in any stay ruling, irreparable harm, also weighs strongly in NRG's favor. Here, NRG need only demonstrate irreparable harm which cannot be remedied for the "money, time, and energy necessarily expended in the absence of a stay".<sup>12/</sup> It is well settled that injury is "irreparable" if no

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<sup>12/</sup> Virginia Petroleum, supra, 259 F.2d at 925.

practical remedy exists to repair it.<sup>13/</sup> Thus, even where there are pending administrative appeals, if the proceeding is too protracted, equity may intervene.<sup>14/</sup>

Unfortunately, until such time as the Commission provides adequate clarification regarding the renewal of 220 MHz licenses, and licensees with licenses involved in renewal applications respond in compliance or non-compliance, parties intending to bid in the upcoming auction, including NRG, cannot determine what licenses, will be or will likely be (i.e., have an "expectancy" to be) renewed. Without this determination bidders have no way of knowing which channels in an EA or EAG will be protected under incumbent Phase I licenses and thus factor this information into a reasoned bid for an EA or EAG which includes these incumbent channels.

NRG and other potential bidders will suffer irreparable injury if the Commission holds the auction as scheduled. Since the provision 220 MHz service is NRG's and presumably other potential bidders' primary business focus, the lack of information relating to renewed 220 MHz licenses would have an enormous adverse impact on these parties' ability to bid intelligently in the auction, raise and commit capital for this purpose. The lack of information

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<sup>13/</sup> Bannercraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345, 356, at n.9 (D.C. Cir. 1972), rev'd on other grounds, 415 U.S. 1 (1974), vacated, 466 F.2d and 495 F.2d 1074 (D.C. Cir. 1974).

<sup>14/</sup> See, Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 591 (1926).

will cause the bids to be unnecessarily speculative--high or more likely low--and to be a poor reflection of fair market value to the detriment of not only NRG but the Commission as well. At this "dawning" of a potential "rebirth" of 220 MHz--the Phase II license auctions--this 220 MHz with its exceptionally erratic and difficult history to date--should not, once again, be subject to major and unnecessary uncertainties and confusion.

Were potential bidders forced to prepare for the auction based on the limited information now at hand, the Commission would effectively guarantee substantial and irreparable harm to NRG and other potential bidders. In the absence of a stay, NRG would be forced to bid on licenses it desires with no rational way to place a reasonable value on them because there is no way to determine the outcome of incumbents pending license renewal applications.

If NRG ultimately prevails in obtaining Commission clarification, as it believes it will, the relief it is now seeking if not coupled with a reasonable auction stop or postponement, will come too late. Given the seriously inconsistent treatment of the Commission with respect to 220 MHz renewal applications as set forth in NRG's Petition for Declaratory Ruling, and the described adverse consequence to NRG and other prospective auction bidders, it is both reasonable and fair to stay the 220 MHz auction pending final resolution of the issues.

**C. Issuance of a Stay Would Not Substantially Harm Any Other Interested Parties.**

On this issue, NRG need only show that issuance of a stay would not have a "serious adverse effect" on other interested persons.<sup>15/</sup> The injury to other parties cannot be speculative or slight; rather, others must suffer some serious and palpable injury resulting from a grant of this petition.

There is only one category of interested parties affected by this petition: other potential bidders similarly situated to NRG. They will suffer no measurable harm, much less a serious adverse effect, as a result of a grant of stay of the 220 MHz auction. Indeed, they will receive the very same benefit that NRG will.

The vast majority of potential bidders will likely be relieved to have additional time to assess their options or otherwise finalize plans with respect to the 220 MHz spectrum particularly since the Commission only recently finalized rules on 220 MHz.<sup>16/</sup> These rule changes include allowance to aggregate contiguous channels, allowance of paging and fixed services, repeal of 40-mile rule with no spectrum cap, etc. All face the same decisionmaking process as NRG and today all have the same incomplete information on which to base such an important determination. In any event, grant of a stay would not delay any decision that they may desire to take. Thus, a stay would benefit, not harm, this category of interested party.

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<sup>15/</sup> Virginia Petroleum, supra, 259 F.2d at 925.

<sup>16/</sup> See, Memorandum Opinion and Order on Reconsideration in PR Docket No. 89-552, GN Docket No. 93-252, and PP Docket No. 93-253, FCC 98-93, (rel. May 21, 1998).

Any argument that a stay could delay entry into the 220 MHz marketplace is theoretical, not real. It is also speculative. In sum, no substantial harm will come to any other interested party as a result of a grant of a stay.

**D.    The Public Interest Favors a  
Grant of This Motion.**

As described above, NRG and other potential bidders will suffer irreparable harm if the Commission proceeds to auction the 220 MHz spectrum without providing clear guidance as to how the 220 MHz renewal applications will be treated in light of the renewal expectancy showing that appears to have been missing from the majority of the renewal applications submitted to the Commission. The public interest cannot be served by such harm. However, the public interest can be served by grant of the temporary stay requested herein, because it will prevent parties from being forced to bid on properties and pay monies to the U.S. government based on insufficient information.

Further, the Commission has previously postponed other auctions including the 220 MHz auction pending the resolution of petitions for reconsideration. But more importantly, the Commission has postponed auctions on its own action because it would serve the public interest.<sup>17/</sup>

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<sup>17/</sup> See, Public Notice, "LMDS Auction Postponed Until February 18, 1998, DA 97-2352" (rel. November 10, 1997) ("Auction Notice") where the Commission stated that the postponement of the LMDS auction would provide greater opportunity for prospective applicants to participate and further opportunities for businesses to access additional sources of capital to further the advent of new competition.

There are other public purposes which also favor a grant of stay. These include fostering competition, preserving the economic viability of existing entities by granting each of their renewal applications when in conformance with clear policy and procedure, and expediting administrative action on the underlying issues which have lead to this petition.

Expediting administrative action is perhaps the most important public interest objective. Critical decisions must be made in response to availability of 220 MHz spectrum in any EA or EAG for the upcoming auction.

Some incumbents intending to bid in the auctions may desire not to face additional competition that may result from granting the relief in this petition. However, such desires would be a detriment to the public interest and should not be considered as an injury under the subject criteria for granting a stay.

#### **IV. CONCLUSION**

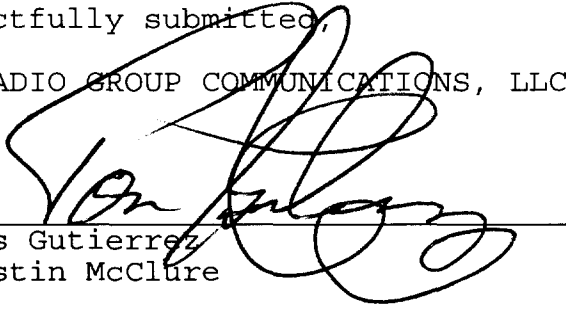
NRG has demonstrated the appropriateness of a stay of the 220 MHz auction scheduled on September 15, 1998 until such time as the Commission provides adequate and timely clarification of the requirements for 220 MHz renewal applications and licensees with granted or pending renewals may conform with such requirements in appropriate filings. NRG is likely to prevail on the merits of its Petition for Declaratory Ruling. NRG will be irreparably harmed in the absence of stay. Other interested parties will not be injured in any meaningful way by grant of stay, and the public interest would be served by such grant.

Wherefore, NRG urges the Commission to stay the 220 MHz auction until a date not less than 90 days after the Commission provides clarification of the status of all Phase I 220 MHz renewal applications.

Respectfully submitted,

NET RADIO GROUP COMMUNICATIONS, LLC

By

  
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August 10, 1998

CERTIFICATE OF SERVICE

I, Jennifer McCord, a legal assistant in the law firm of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have had hand delivered on this 10th day of August, 1998, the foregoing "MOTION FOR TEMPORARY STAY" to the following:

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A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke, is written over a horizontal line. Below the line, the name "Jennifer McCord" is printed.

Jennifer McCord